IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1177627 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: ROBERT D. NICKELS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1786

ROBERT D. NICKELS

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 137.30-1.

By order dated 25 April 1969, an Examiner of the United States Coast Guard at San Francisco, California, revoked Appellants seaman's documents upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The specification as found proved alleges that Appellant was on 8 September 1967 convicted of a violation of Section 11556 of the Health and Safety Code, a narcotic drug law of the State of California, in the Superior Court in and for the City and County of San Francisco.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge specification.

The Investigating Officer introduced evidence of Appellant's conviction on a plea of guilty

In defense, Appellant offered evidence of later action by the Court.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification as amended had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 12 June 1969. Appeal was timely filed, and perfected on 9 July 1969.

FINDINGS OF FACT

On 8 September 1967, Appellant was convicted on a plea of guilty in the Superior Court, in and for the City and County of San Francisco, of violation of Section 11556 of the California Health and Safety Code. On 22 November 1967 Appellant was placed on probation for a period of two years' on condition that he pay a fine of $100 and other penalties. By an undated order pursuant to Sections 1203.3 and 1203.4 of the California Penal Code, filed with the Clerk of the Court on 25 October 1968, Appellant was released from probation and from "all penalties and disabilities resulting

from the alleged offense."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that:

(1) The conviction in this case was not final;

(2) The proceeding is a denial of due process; and

(3) The proceeding is a denial of equal protection of the law.

APPEARANCE: Richard A. Hodge, Esquire, San Francisco, California

OPINION

I

Appellant's first point is novel in proceedings under 46 U.S.C. 239b stemming from California conviction of narcotic drug law violations. He does not here argue that the court's action under California Penal Code Sections 1203.3 and 1203.4 operated to "expunge" his conviction completely from the record. (I have held in the past that such is not the effect of the California action since the "expunged" or "dismissed" charge is still a prior conviction to be considered in sentencing for certain second offenses. Decision on Appeal 1223).

Here, Appellant argues that his conviction was never "final" within the meaning of 46 U.S.C. 239b. Appellant discusses, with citations at length to California decisions and law review material a distinction between the term "conviction" as meaning only a plea or a verdict which results in a finding that a defendant is guilty and the term "conviction" more strictly construed to mean a final order or judgment of conviction. In this connection, Appellant declares that reliance upon Korenatsu v. United States, (1943) 319 U.S. 432 was ill placed in Decision on Appeal No. 852 because that case turned not on the finality of the District Court's action as a judgment of conviction in the second sense mentioned above but only on whether the decision was "final" so as to be appealable under Federal law.

On the record of this case, these distinctions need not be explored.

Appellant says that there was no"judgment" of conviction" entered in his case in the second sense of conviction, so that his conviction was not "final" in the sense of 46 U.S.C. 239b. The issue raised is whether "final" in Section 239b must be construed in a Federal sense or a State's sense. Federal laws dealing with seamen must be construed in a Federal context to insure uniformity of application. Congress carefully considered one aspect of this question by providing that the term "narcotic drug" must have the Federal meaning, 46 U.S.C. 239a.

Exhibit "2" in this record demonstrates that Appellant pleaded guilty to a violation of Section 11556 Health and Safety Code of California. Exhibit "1", a court record, reads, in pertinent part:

> "The defendant having been convicted of the crime of . . . violation of Section 11556 Health and Safety Code . . . the Court now orders that the said defendant be placed on probation for the period of 2 years, subject to the following terms and conditions, to wit, Defendant shall . . . pay a fine of $100 . . ."

These documents show a conviction on a plea and a sentence. Under the provision of 46 CFR 137.03-10(a) ("A conviction becomes final when no issue of law or fact determinative of the seaman's guilt remains to be decided by the trial court.") The conviction here was final.

II

When Appellant declares that he was "denied a hearing consistent with principles of due process of law," he specifically argues that the permissive "may" of 46 U.S.C. 239b has improperly been converted to an imperative "shall," with respect to an order of revocation, in 46 CFR 137.03-10. This argument falls upon a reading of the statute.

The "permissiveness" of the "may" extends only to whether action to bring an appropriate case to hearing is to be instituted. Once the discretionary decision to take the matter to hearing has been made and the case has been completed before and submitted to an examiner, there are only two possible results, when, as here, a conviction is the basis of the proceedings. The examiner may only:

(1) find that there was no conviction within the meaning of the statute, in which case he must dismiss the charges, or

(2) find that there was a conviction within the meaning of the statute, in which case he must order revocation of the documents in question.

There is no discretion as to the order provided for in the statute.

The suggestions by Appellant that the offense of which he was convicted did not involve moral turpitude, that safety at sea is not involved, and that the Supreme Court, in Leary v. United States (1969), 395 U.S. 6, distinguishes, obiter, between "occasional" and "regular" users of marijuana, are irrelevant in a "conviction" case such as this one. "Users" is not in issue nor is what is a "user" within the meaning of 46 U.S.C. 239b. There is no question here that there was a conviction. Given a conviction within 4l U.S.C. 239b in a case brought before an examiner for initial decision, a party may not go behind the conviction. A party may collaterally attack the conviction on the grounds that he was not guilty of the offense of which he was convicted; no more can he attempt to circumvent the effect of the conviction by showing that he was only an "occasional" or "inexperienced" user. Under the governing statute it does not matter whether the conviction was for possession, sale, or use of narcotics; the only question is whether there was a conviction within the meaning of 46 U.S.C. 239b. Earlier in this opinion I have stated the basis for my decision that there

was such a conviction.

III

Appellant's third point, that he is being denied equal protection under the law, is based on two assertions:

(1) that there are different standards applied to those whose convictions are expunged under 18 U.S.C. 5021(b) and those whose convictions are "expunged" under Section 1203.4 of the California Penal Code, and

(2) that the Coast Guard does not treat its own members involved in marijuana offenses with the inflexible severity that it treats errant merchant seamen.

IV

With respect to Appellant's first assertion under his third point, there is no need to belabor the distinction between the Federal law, which applies only to "youth" offenders, and the California law which is not limited to youth offenders. The important distinction is that the Federal law does not permit the original "conviction" to be used for any purpose while the California law does. See Decisions on Appeals Nos. 1223 and 852 cited above in "Opinion, I."

V

Appellant's second assertion under his third point overlooks several distinctions. What happens to merchant seamen under 46 U.S.C. 239b cannot be equated to what happens to members of the Coast Guard under the Uniform Code of Military Justice (10 U.s.c. 801-934).

Appellant's argument implicitly asserts an equivalence of revocation of a seaman's document to a punitive discharge from an armed service. There is no such equivalence--the former is an administrative sanction the latter is a criminal punishment.

To lay to rest possible future questions in this area, some discussion of the difference between the controlling statutes may be in order. The Uniform Code of Military Justice, hereinafter referred to as "UCMJ," does not include specific prohibitions dealing with narcotics or dangerous drugs. It was left to the Secretary concerned to make regulations in this area and offenses are chargeable under the "General Article" (10 U.S.C. 934). For a "drug" specification to stand under UCMJ there must be found:

(1) an act which is prejudicial to good order and discipline in the service;

(2) an act which brings discredit to the service; or

(3) an offense which is a crime or offense, not capital, under Federal law.

O'Callahan v. United States (1969), 395 U.S. 258, need not detain us here; its relevance is only to persons who are members of the armed forces. What does concern us here is the distinction in Acts of Congress.

When an Act of Congress directs me, or the supervisory Secretary, to revoke a seaman's document, it is not for me to question whether the Act of Congress is constitutional. That is a question only for consideration by the Federal Judiciary system. On this basis alone the marked distinction is clear.

A person who receives a bad conduct or dishonorable discharge from an armed force as a result of court-martial sentence is adjudged a criminal and is, absent error, marked forever as such. A person whose merchant mariner's document is revoked is not by the action of revocation alone marked as a criminal, although the actions prior to the order of revocation may have been criminal. While a person against whom is adjudged the maximum sentence of a court-martial is forever branded, a merchant seaman whose document is revoked has opportunity, after three years, to apply for a new document.

Since the laws involved here are different in nature, their sanctions are different in nature, and future remedies for the affected persons are different in nature, there is no real question in this case as to "equal protection."

Other distinctions need not be noted. The unambiguous Act of Congress controls.

ORDER

The order of the Examiner dated at San Francisco, California, on 25 April 1969, is AFFIRMED.

P. E. TRIMBLE
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 9 day of APR 1970.

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